

4. Failure to barricade.
5. Failure to clean up during and after performance of the work.

~~6. Any violation of this Chapter, the Construction and Excavation Standards or other City ordinance. (NOTE: A warranty for specific work should not extend to unrelated work. This is not the commercial standard for construction warranties).~~

B. The warranty period shall begin on the date of the City's probationary acceptance of the work. If repairs are required during the warranty period, those repairs need only be warranted until the end of the initial two ~~three~~ year period starting with the date of probationary acceptance.

C. At any time prior to completion of the warranty period, the City may notify the permittee in writing of any needed repairs. Such repairs shall be completed within twenty four hours if the defects are determined by the City to be an imminent danger to the public health, safety and welfare. Non-emergency repairs shall be completed within thirty calendar days after notice.

D. The warranty shall cover only those areas of work undertaken by the permittee which provided the warranty and not directly impacted by the work of any other permittee or the City. In the event that a portion of work warranted by a permittee is subsequently impacted by work of another permittee or the City during the warranty period, the other permittee or the City, as applicable, shall assume responsibility for repair to the subsequently impacted portion of the public right-of-way.

12.04.130 Inspections.

- A. The following four inspections shall take place, at a minimum:

~~1. Pre construction inspection. The permittee shall request that the City conduct a pre-construction inspection, to determine any necessary conditions for the permit. (NOTE: Qwest feels that this is unnecessary given the substantial amount of information required during the application process and the fact that Qwest warrants its work and compliance with City requirements).~~

2. Completed work inspection. The permittee shall notify the City immediately after completion of work. The City shall inspect the work within twenty one days of the permittee's notification. Probationary acceptance shall be made if all work meets all standards set forth in this Chapter and any other applicable City ordinance or resolution.

3. Warranty inspection. Approximately thirty days prior to the expiration of the two ~~three~~-year warranty period, the City shall conduct a final inspection of the work. If the work is still satisfactory the bond or letter of credit

shall be returned or allowed to expire, with a letter of final acceptance, less any amounts needed to complete work not completed by permittee.

4. Utility marking inspection. The City shall conduct a utility marking inspection pursuant to Chapter 12.06 of this Code.

B. Upon review of the application for a permit, the Director shall determine how many additional inspections, if any, may be required. The total number of required inspections shall be listed on the permit. For a permit which does not include excavation, the City may waive any or all of the above-listed inspections.

12.04.140 Time of completion.

A. All work covered by the permit shall be completed by the date stated on the application.

B. Permits shall be void if work has not commenced within thirty days after issuance, unless an extension has been granted by the City.

12.04.150 Joint planning and construction.

A. Permittees shall make reasonable efforts to attend and participate in meetings of the City, of which the permittee is notified, regarding public right-of-way issues that may impact its facilities, including, planning meetings to anticipate joint trenching and boring.

B. A permittee owning, operating or installing facilities in public rights-of-way shall meet annually with the City, at the City's request, to discuss the permittee's planned major excavations in the City. As used in this Subsection, the term "planned major excavations" means any future excavations planned by the permittee that will affect any public right-of-way for more than five days and are more than one thousand (1,000) feet in length, provided that the permittee shall not be required to identify future major excavations planned to occur more than three years after the annual meeting ~~date that the permittee's master plan or update is discussed~~. Between the annual meetings to discuss planned major excavations, the permittee shall use its best efforts to inform the City of any substantial changes in the planned major excavations discussed at the annual meeting.

C. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, a permittee shall meet and cooperate with other providers, licensees, permittees, and franchisees so as to reduce so far as possible the number of street cuts within the City and the amount of pedestrian and vehicular traffic that is obstructed or impeded. ~~Should two permittees refuse to joint trench or share bores or street cuts, the City may require each permittee to submit written evidence detailing why such sharing would be impossible or impractical. Should the permittee fail to provide evidence satisfactory to the City, the City may deny a~~

~~permit application on that basis. (NOTE: The requirement of this section exceeds the City's authority in that it is regulation of the actual provision of telecommunications services. This duty is relegated to the PUC. The City cannot deny a permit due to a provider not joint trenching, or failing to provide, what in the City's sole opinion, a good enough justification. Qwest will absolutely work with industry to minimize impact to City streets~~

12.04.160 Locate information.

A. All users of the public rights-of-way in the City shall have an ongoing obligation to provide locate information to other users of the public rights-of-way and the City for the purpose of either design or construction.

B. In locating facilities in the public rights-of-way in preparation for work, a permittee shall compile all information obtained regarding its or any other facilities in the public rights-of-way related to a particular permit, and shall submit that information to the City in a format acceptable to the City.

C. Prior to the City undertaking any work in the public rights-of-way, the City may notify all permittees of the City work to be performed. Upon such notification, all permittees shall, within seven days, locate their facilities in the public rights-of-way in which the work will be performed, and provide documentation in a form acceptable to the City of the location of the permittee's facilities in that public right-of-way.

D. Before beginning excavation in any public right-of-way, a permittee shall contact the Utility Notification Center of Colorado (UNCC) and, to the extent required by C.R.S. § 9-1.5-102 et seq., make inquiries of all ditch companies, utility companies, districts, local governments, and all other agencies that might have facilities in the area of work to determine possible conflicts. The permittee shall contact the UNCC and request field locates of all facilities in the area pursuant to UNCC requirements. Field locates shall be marked prior to commencing work.

12.04.170. Minimal interference with other property.

A. Work in the public right-of-way or on or near other public or private property shall be done in a manner that causes the least interference with the rights and reasonable convenience of property owners and residents. Facilities shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any City property, or with any other pipes, wires, conduits, pedestals, structures, or other facilities that may have been laid in the public rights-of-way by the City or its authority.

B. Facilities shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with new improvements the City may deem proper.

C. Facilities shall not unnecessarily hinder or obstruct the free use of the public rights-of-way or other public property, shall not interfere with the travel and use of the public rights-of-way by the public during the construction, repair, operation or removal thereof, and shall not obstruct or impede traffic.

12.04.180 Underground construction and use of poles.

A. When required by City ordinance, resolution, regulation or rule or applicable State or federal law, facilities shall be placed underground at no cost to the City. Placing facilities underground shall not preclude the use of ground-mounted appurtenances.

B. If allowed under applicable state and federal law, ~~Where~~ all existing facilities in a particular location are installed underground at the time of construction, or where all such facilities are subsequently placed underground, all of a permittee's facilities in that location shall also be placed underground at no expense to the City unless funding is generally available for such relocation to all users of the public rights-of-way.

C. In areas where existing facilities are above-ground, the permittee may install above-ground facilities.

D. For above-ground facilities, a permittee shall utilize existing poles and conduit wherever possible.

12.04.190 Use of trenches and conduits by City.

A. Should the City desire to place its own facilities in trenches or bores opened by the permittee, the permittee shall cooperate with the City in any construction by the permittee that involves trenching or boring, provided that the City has first notified the permittee in some manner that it is interested in sharing the trenches or bores in the area where the permittee's construction is occurring. A permittee shall allow the City to place its facilities in the permittee's trenches and bores, provided the City incurs any incremental increase in cost of the trenching and boring. The City shall be responsible for maintaining its respective facilities buried in the permittee's trenches and bores under this Section.

~~B. Unless otherwise prohibited by law, the City may install or affix and maintain its own facilities for City purposes in or upon any and all of a permittee's ducts, conduits or equipment in the public rights of way and other public places, at a charge to be negotiated between the parties (but in no event greater than the highest price charge by the permittee to any other user), to the extent space therein or thereon is reasonably available, and pursuant to all applicable City ordinances. For purposes of this Section, "City purposes" includes, but is not limited to, the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. (NOTE: This section should not be included in a ROW Ordinance. If the City wants to purchase facilities from Qwest, this should be handled outside of this ordinance.)~~

12.04.200 Construction and excavation standards.

A. Each permittee shall comply with the Construction and Excavation Standards for all work in the public right-of-way, including the location of the work and facilities within the public right-of-way.

B. The permittee shall be fully responsible for the cost and actual performance of all work in the public right-of-way.

C. All restoration shall result in a work site condition equal to or better than ~~that which~~that, which existed prior to the work.

12.04.210 Restricted rights-of-way. (NOTE: Qwest is a provider of last resort, and has state obligations to serve customers on request. To the extent that this ordinance places Qwest in a position where we might violate that obligation, an exception needs to be carved out.)

A. To reduce the impact of work within the public right-of-way in and around certain heavily-traveled arterial and collector streets within the City, the City shall employ a rotating permit schedule for work in such public rights-of-way.

B. Those public rights-of-way in and around the streets listed in the Construction and Excavation Standards as "restricted rights-of-way" shall be subject to this Section.

C. Work shall only be permitted within any restricted right-of-way once every three years. The procedure for such rotation shall be as follows:

1. The City shall publish once in a newspaper of general circulation during the month of January of each year, a list of those restricted rights-of-way (by street name) in which work shall be permitted each year for the next two ~~three~~ years. The list shall also be published on the City's website.

2. Any person wishing to perform work in a restricted right-of-way on the list for a given year shall file a completed application pursuant to Section 12.04.060 ***on or before March 1*** (NOTE: Again, Qwest must provide service upon request. We will not have this available one year in advance.) of that year.

3. The City shall review the permit application and approve or deny the permit in accordance with Section 12.04.070.

4. All permitted work shall be performed between March 1 and October 31.

5. After October 31, the restricted right-of-way shall be ineligible for work until January of one ~~two~~ calendar years later, and then the process shall begin again.

C. If a restricted right-of-way is subject to excavation or construction as part of a City, state or other public improvement project, public right-of-way permits may be issued by the City for work during such improvement project notwithstanding the schedule set forth in this Section.

D. Exemption from restricted schedule. ~~In rare circumstances, the~~ The City may grant an exemption from the schedule for restricted rights-of-way in accordance with the following procedures.

1. A request to be exempted from the restricted schedule shall be in writing on a form acceptable to the City, and shall contain the following information, at a minimum:

a. A detailed and dimensional engineering plan that identifies and accurately represents all public rights-of-way and other property that will be impacted by the proposed work, and the method of construction.

b. The location, width, length, and depth of the proposed excavation.

2. Criteria for approval. In determining whether an exemption should be granted, the City shall consider the following criteria, at a minimum:

a. Whether alternative utility alignments that do not involve excavating in the restricted public right-of-way are available.

b. Whether the proposed excavation can reasonably be delayed until after the three year deferment period has elapsed.

c. Whether duct or conduit is reasonably available from another user of the public right-of-way.

d. Whether the proposed work involves joint trenching or joint use, and the number of users to share in the trenching or use.

e. Whether the proposed work is to be by horizontal boring, tunneling or open trenching.

f. Whether the proposed applicant has a legal obligation under applicable state or federal law to provide service to customers within the restricted area.

E. Exemptions for emergency operations. Emergency maintenance operations in restricted rights-of-way shall be limited to circumstances involving the preservation of life or property, or the restoration of customer service. Any person commencing operations under this Subsection shall submit detailed engineering plans, construction methods and remediation plans no later than one working day after initiating the emergency operation.

12.04.220 Relocation of facilities.

A. If at any time the City requests a permittee to relocate its facilities in order to allow the City to make any public use of rights-of-way, or if at any time it shall become necessary because of a change in the grade or for any other purpose by reason of the improving, repairing, constructing, or maintaining of any public rights-of-way, or by reason of traffic conditions, public safety or by reason of installation of any type of structure of public improvement the City ~~or other public agency or special district, and any general program for the undergrounding of such facilities,~~ (NOTE: Quasi-governmental agencies must reimburse Qwest for relocation. In addition, HB 1134 requires Cities to reimburse utilities for placing plant underground.) to relocate facilities within or adjacent to public rights-of-way in any manner, either temporarily or permanently, the City shall notify the affected permittee, at least ninety (90) days in advance, except in the case of emergencies, of the City's intention to perform or have such work performed. The permittee shall thereupon, at no cost to the City, accomplish the necessary relocation within a reasonable time from the date of the notification, but in no event later than three (3) working days prior to the date the City has notified the permittee that it intends to commence its work or immediately in the case of emergencies.

B. Should the permittee fail to perform the relocation, the City may perform such relocation at the permittee's expense and the permittee shall reimburse the City as provided in Section 12.04.250.

C. Following relocation, the permittee shall, at the permittee's own expense, restore all affected property to, at a minimum, the condition which existed prior to the work. A permittee may request additional time to complete a relocation project, and the City may grant an extension if, in his or her sole discretion, the extension will not adversely affect the City's project or the public use of the affected public rights-of-way.

12.04.230 Abandonment and removal of facilities.

A. Notification. A permittee that intends to discontinue use of any facility within the public right-of-way shall notify the City in writing of the intent to discontinue use. Such notice shall describe the facilities for which the use is to be discontinued, a date of discontinuance of use, which date shall not be less than thirty (30) days from the date such notice is submitted to the City, and the method of removal and restoration.

B. The permittee may not remove, destroy or permanently disable any such facilities during said thirty (30) day period without written approval of the City. After thirty (30) days from the date of such notice, the permittee shall remove and dispose of such facilities as set forth in the notice, as the same may be modified by the City, and shall complete such removal and disposal within six (6) months, unless additional time is requested from and approved by the City.

C. Abandonment of facilities in place. Upon prior written approval of the City, a permittee may either:

1. Abandon the facilities in place, and immediately convey full title and ownership of such abandoned facilities to the City. The only consideration for the conveyance shall be the City's permission to abandon the facilities in place. The permittee shall be responsible for all obligations and liabilities until the conveyance to the City is completed.

2. Abandon the facilities in place, but retain ownership and responsibility for all liabilities associated therewith.

12.04.240 Emergency procedures.

A. Any person maintaining facilities in the public right-of-way may proceed with repairs upon existing facilities without a permit when emergency circumstances demand that the work be done immediately. The person doing the work shall apply to the City for a permit on the first working day after such work has commenced. All emergency work shall require prior telephone notification to the City Police Department and the appropriate fire protection agency.

B. If any damage occurs to an underground facility or its protective covering, the contractor shall notify the facility's owner promptly. When the facility's owner receives a damage notice, the facility's owner shall promptly dispatch personnel to the damage area to investigate. If the damage results in the escape of any inflammable, toxic, or corrosive gas or liquid or endangers life, health, or property, the contractor responsible shall immediately notify the facility's owner and 911 and take immediate action to protect the public and nearby properties.

12.04.250 Reimbursement of City costs.

A. The City may make any repairs necessary to eliminate any safety hazard and/or to correct any work not performed by a permittee as directed. Any such work performed by the City shall be completed and billed to the permittee at overtime rates.

B. The permittee shall pay all such charges within thirty (30) days of the statement date. If the permittee fails to pay such charges within the prescribed time period, the City may, in addition to taking other collection remedies, seek reimbursement through the performance bond or letter of credit. Furthermore, the permittee may be barred from performing any work in the public right-of-way, and under no circumstances will the City issue any further permits of any kind to said permittee, until all outstanding charges have been paid in full, unless such charges have been disputed by the permittee in accordance with the terms contained in this Ordinance.

12.04.260 Permit revocation and stop work orders.

A. A public right-of-way permit may be revoked or suspended by the City, after written notice to the permittee, for any of the following:

1. A material ~~Violation~~ violation of any condition of the permit or any provision of this Chapter or the Construction and Excavation Standards.

2. A material ~~Violation~~ violation of any other City ordinance or state law relating to the work.

3. Existence of any condition or performance of any act which, in the City's determination, constitutes or causes a condition endangering life or property.

B. Stop work orders. A stop work order may be issued by the City to any person or persons performing or causing any work to be performed in the public right-of-way for:

1. Performing work without a permit except for routine maintenance or emergency repairs to existing facilities as provided for in this Chapter.

2. Performing work in violation of any provisions of this Ordinance, or any other ordinance of the City, or state law relating to the work.

3. Performing any ~~act which~~ act, which, in the City's determination, endangers life or property.

C. A suspension, revocation or stop work order shall take effect immediately upon delivery of written notice to the person performing the work, or

upon mailing first-class mail, postage prepaid, to the permittee's last known address.

12.04.270 Penalties.

~~A. If any person, firm or corporation is found guilty of or pleads guilty to a violation of any of the provisions of this Chapter, they shall be punished as provided in Section of this Code. Each and every day or portion thereof during which a violation is committed, continues or is permitted shall be deemed a separate offense.~~

~~B. In addition to or in lieu of the penalty set forth in Subsection A,~~ (NOTE: Qwest should not be subject to criminal sanctions for violations of a right-of-way ordinance) The City may impose the following monetary penalties:

1. For any occupancy of a travel lane or any portion thereof beyond the time periods or days set forth in the traffic control plan approved by the City:

a. In arterial and collector streets (as defined in the City of Greenwood Village Transportation Plan) during the hours of 6:30 a.m. through 8:30 a.m. and 3:30 p.m. through 6:00 p.m., Monday through Friday: ~~one hundred dollars (\$100) for each fifteen minutes, or portion thereof, for a maximum of three thousand dollars (\$3,000) per day.~~ (NOTE: These are excessive. They should be reduce substantially. \$300 per day would be adequate).

b. In arterial and collector streets during any time other than the times specified in Subsection a., or in local streets at any time: ~~fifty dollars (\$50) for each fifteen minutes, or portion thereof, for a maximum of fifteen hundred dollars (\$1,500) per day.~~ (NOTE: These are excessive. They should be reduce substantially. \$200 per day would be adequate).

2. For commencing work without a valid permit: five hundred dollars (\$500), ~~plus twice the applicable permit fee.~~

3. For any other violation of a permit: two hundred fifty dollars (\$250) per violation, with no maximum amount.

C. The penalties set forth in this Section shall not be the City's exclusive remedy for violations of this Chapter, and shall not preclude the City from bringing a civil action to enforce any provision of a public right-of-way permit, or to collect damages or recover costs associated with any use of the public rights-of-way. Furthermore, the exercise of one penalty shall not preclude the City from exercising any other penalty.

INTRODUCED AND APPROVED ON FIRST READING ON THE ____ DAY OF _____, 2001, AND ORDERED PUBLISHED IN THE VILLAGER.

David W. Phifer, Mayor

Mareile Webster, City Clerk

David W. Phifer, Mayor

Mareile Webster, City Clerk

EFFECTIVE: _____

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Notice of Inquiry:)

Promotion of Competitive Networks in Local)
Telecommunications Markets)

WT Docket No. 99-217

**EX PARTE COMMENTS OF THE
CITY OF GREENWOOD VILLAGE, COLORADO**

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Dr., Suite 900
Denver, Colorado 80209

Attorneys for the City of
Greenwood Village, Colorado

July 5, 2001

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Notice of Inquiry:)	
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Promotion of Competitive Networks in Local)	WT Docket No. 99-217
Telecommunications Markets)	
)	

**EX PARTE COMMENTS OF THE
CITY OF GREENWOOD VILLAGE, COLORADO**

I. INTRODUCTION

The City of Greenwood Village, Colorado ("Greenwood Village") is located on the south side of the Denver metropolitan area. Greenwood Village is a member of the Greater Metro Telecommunications Consortium, which filed comments in this proceeding dated October 11, 1999.

Recently, Greenwood Village has learned that Qwest Communications Corporation ("Qwest") held meetings with Commission Staff during the month of March 2001, and on March 28, 2001 filed ex parte documents dated March 27, 2001 with respect to those meetings. The ex parte filings (and presumably the information shared with Commission Staff in meetings during the month of March) contains information regarding Greenwood Village, and its pending process of drafting and implementing a right of way regulatory ordinance, which in some cases are inaccurate, and in others, outright falsehoods. Greenwood Village was not provided with any notice from Qwest indicating that Qwest had cited Greenwood Village in support of its argument seeking a rulemaking from the Commission that would preempt local government right of way management authority. In these comments, Greenwood Village seeks to correct the record by identifying the inaccurate information provided by Qwest, and describing the true state of affairs in connection with Greenwood Village's ordinance.

II. DRAFTING AND CONSIDERATION OF GREENWOOD VILLAGE'S RIGHT OF WAY ORDINANCE

Greenwood Village staff has been working on the development of a comprehensive right of way management ordinance for approximately three years. Qwest has been an active participant in reviewing various drafts of this ordinance and providing comments, both in writing and in meetings, with respect to the ordinance. James P. Campbell, one of the Qwest representatives who met with Commission Staff in March, had direct knowledge of the status of the Greenwood Village discussions regarding this ordinance at the time of Qwest's ex parte filing with the Commission. Mr. Campbell has been the Qwest representative who has had direct contact with Greenwood Village meetings and correspondence regarding the proposed right of

way ordinance. See, Affidavit of Assistant City Attorney Kendra L. Carberry, attached as Exhibit A. What follows is a point by point description of, and response to inaccurate and misleading information represented by Qwest in its ex parte filing.

1. One of the documents contained in Qwest's ex parte filing is titled "FCC Presentation Regarding Access to Public Rights of Way and Franchise Issues, Washington D.C., March 9, 2001" ("Qwest Presentation Document"). On Page 5 of the Qwest Presentation Document, under the heading "What is the Problem", Qwest includes a subheading of "Specific Examples", followed by identification of ordinances from municipalities around the country that it claims are inappropriate forms of regulation under Section 253 of the Telecommunications Act. The clear implication of Qwest's comments is that each of the identified regulations have been adopted, and are currently in force. This is not true in connection with the Greenwood Village ordinance. Qwest did not represent in its ex parte filing that the Greenwood Village ordinance has not been adopted. Qwest provided Commission Staff with excerpts of "Draft No. 3" of that ordinance. The City is currently working on Draft No. 10. The draft ordinance has not yet been developed to a point where it has been presented to the City Council for a Study Session. Qwest inaccurately represented this document as the current state of the law in Greenwood Village.

2. On Page 7 of the Qwest Presentation Document, under a heading "Imposition of Third Tier of Regulation Unrelated to the Management of Rights of Way", Qwest identifies Greenwood Village and states "requirement that providers submit 'as built' location of facilities under electronic format specifically requested by the City (GIC, AUTOCAD)". In support of that statement, Qwest submitted an excerpt of Draft No. 3 of the Greenwood Village ordinance dated 3/7/01. The ordinance did not contain a requirement for the production of "as built" maps. However, Section 12.04.060.C.1 requires submittals in accordance with the City's Construction and Excavation Standards, a separate document. Those standards now require submittal of daily as built maps during construction. In any event, it is inconceivable that Qwest could argue that a requirement to provide maps of facilities located in public rights of way amounts to a third tier of regulations. Qwest does not cite (nor can it cite) any state or federal regulations that require maps detailing the exact location of private facilities in public rights of way, to be provided to the local government owners of those rights of way. As an example of why such a regulation is not only reasonable, but necessary, Greenwood Village's existing right of way ordinance requires delivery of as built maps at the end of construction. Recently, another telecommunications company undertook a major excavation project in Public rights of way in Greenwood Village. It provided as built maps at the end of the project. Upon review of those maps, the City determined that **a full 60%** of the installation was out of the alignment identified on the original plans, and a portion of the facilities were installed outside of the public rights of way, on private property. The City is now left with the choice of requiring this company to dig up the streets again and re-do their project, or requiring easements from the private property owners. It is absolutely essential for a local government to know where private infrastructure in public rights of way is located and to have the information to monitor the installation of that infrastructure during construction.

3. On Page 9 of the Qwest Presentation Document, under the heading "What is the Effect of the Problem?", in a subheading of "Customer Service", Qwest claims that Greenwood

Village “has placed a moratorium on construction permits being issued. This has increased the ‘held order’ problem”. This statement is false. Greenwood Village has enacted no moratorium. In fact, nowhere in the draft of the ordinance that had been shared with Qwest prior to its ex parte filings with the Commission, does the word “moratorium” ever appear. See, Exhibit A, Carberry Affidavit. Attached as Exhibit B is a cover memo from Jim Campbell at Qwest to Assistant City Attorney Kendra Carberry, which includes a marked up version of the Greenwood Village draft ordinance, with Qwest’s comments addressing the various sections of the ordinance Qwest believed needed to be changed. The Commission should note that in Qwest’s own comments to Greenwood Village it makes no reference to any moratorium. Moreover, in all of the meetings between Qwest and Greenwood Village, Qwest never once mentioned any concern about a moratorium. See Exhibit A, Carberry Affidavit.

To the best that Greenwood Village can determine, Qwest’s misleading representation to the Commission of a “moratorium” may refer to language in Section 12.04.210 of the proposed ordinance, which restricts access to a limited number of major streets within the City for “major installations” (which are defined as 500 feet or more of installation), with the restriction being that six streets can be excavated during one year in every three years.

While Qwest never made any comments to Greenwood Village regarding concerns about moratoria, it did raise concerns about restricted access to certain streets in Greenwood Village during a meeting on March 14, 2001, (see Exhibit A, Carberry Affidavit) and in written comments dated March 23, 2001 (see, Exhibit B). Changes were made to accommodate Qwest’s concerns in Section 12.04.210 in a subsequent version of this draft ordinance, which has been provided to Qwest. These changes allow additional exceptions to provide service to new customers, and to address provider of last resort obligations.

Finally, on this point, despite Qwest’s allegation that a Greenwood Village moratorium was increasing a “held order” problem, the Commission should note that Greenwood Village is issuing permits to all telecommunications companies, including Qwest. Qwest has been receiving permits continually, including during the time period in which it represented to the Commission that a moratorium was in place. Qwest has *never* been turned down for a permit to excavate in Greenwood Village as a result of any ordinance or moratorium restricting access to public rights of way. See Exhibit A, Carberry Affidavit.

4. In the Qwest Presentation Document, Qwest made no other specific complaint about any Greenwood Village procedures or requirements. However, Qwest did attach the cover page as well as pages 5, 13, 16, 17 and 19 of Draft No. 3 of the ordinance dated 3/7/01. Greenwood Village has reviewed the substance of the requirements contained on those pages, and compared them to the written comments received from Qwest regarding this ordinance on March 23, 2001, and the changes made to the ordinance in subsequent drafts. In Exhibit B, Qwest raised objections to subsections C and D of Section 12.04.040 of the 3/7/01 draft. Greenwood Village did not agree with Qwest’s proposed change to subsection C, but did agree with the proposed change in subsection D, and incorporated that change into subsequent drafts.

5. When considering the substance of Page 13 of the 3/7/01 draft that Qwest presented to the Commission, Qwest’s 3/23/01 comments identify an objection to subsection B

of Section 12.04.180. In subsequent drafts of the ordinance provided to Qwest, Greenwood Village addressed Qwest's concerns by deleting subsection B in its entirety.

6. On Page 16 of the 3/7/01 draft which Qwest submitted to the Commission, in its written comments to the City, Qwest suggested addition of a new subparagraph F to Section 12.04.210. The City included that new subsection in a subsequent draft, which Qwest presently has in its possession.

7. On Page 17 of the 3/7/01 draft that Qwest submitted to the Commission as evidence of Greenwood Village's actions that are allegedly beyond the scope of Section 253, the City compared the two sections of the proposed ordinance contained on that page (Section 12.04.230 and 12.04.240) with those same two sections that were attached to Qwest's "marked up" version of the ordinance draft dated 3/23/01 (Exhibit B). In Qwest's marked up version, Qwest makes no comment whatsoever regarding either of these two sections. One might expect that if Qwest believed that provisions of the proposed ordinance were so objectionable as to identify them to the Commission in support of a request for a rulemaking that would preempt local right of way authority, that Qwest would have raised its concerns directly to Greenwood Village in the written comments it filed at the same point in time. It is unusual, to say the least, that Qwest would object to a certain provision of an ordinance to the Commission, while at the same time indicating to the City that is considering that ordinance, that Qwest has no objection to those sections.

8. On Page 19 of the 3/7/01 draft provided to the Commission in the ex parte filing, the proposed ordinance addresses penalties for violations of the ordinance. In Qwest's subsequent verbal and written comments to Greenwood Village it objects to the amount of the fines, claiming that they are excessive. Greenwood Village submits that the fines are absolutely appropriate. Greenwood Village is home to the Denver Technological Center, one of the largest employment centers in Colorado. It is also home to perhaps the worst traffic problems in the state as well. Because of the substantial employment base in this community, its location on the south side of the metro area, its being bisected by Interstate 25, the major north/south highway in the State of Colorado, traffic is a major issue and a serious public, health and safety concern on the best of days. Greenwood Village has limited east-west arterial access, and in addition to these "normal" conditions, the City is currently bracing for additional traffic problems as the state begins a major expansion/widening of Interstate 25 as well as construction of a new light rail line along the same corridor. Permit violations that cause major local transportation corridors to be unnecessarily closed especially during rush hour are extremely serious violations and are best addressed through the discretion of local elected officials, as these officials are authorized to act by state law. Greenwood Village believes that companies like Qwest should focus more attention on compliance with the terms of right of way ordinances and completing their work in a reasonable time period, rather than the penalties they will be required to pay if and when they violate those provisions.

Greenwood Village is aware of the requirement that in declaratory and rulemaking proceedings seeking preemption of local right of way authority, petitioners are obligated to provide notice to state and local governments identified as evidence supporting preemption, in order that those entities have a fair opportunity to consider the arguments made and provide their

own information to the Commission for consideration. 47 C.F.R. § 1.1204(b) (note 4 to paragraph (b)); 47 C.F.R. § 1.1206(a) (note 1 to paragraph (a)). Technically, because this proceeding is a Notice of Inquiry, and not a rulemaking or declaratory proceeding, Qwest was not *required* to provide notice to Greenwood Village. However, good faith and fair dealing suggests that Greenwood Village (as well as the other local governments identified in Qwest's filing) should have received notice. This is especially true considering that the representations made about Greenwood Village were inaccurate, misleading and omitted material information regarding the status of the ordinance, considering Qwest's active involvement in the discussions regarding the ordinance, and considering the various changes in the ordinance that have been made to accommodate Qwest's concerns. Greenwood Village only learned of Qwest's filing inadvertently, when a summary was provided to Greenwood Village's outside counsel by another source. Greenwood Village submits to the Commission that Qwest's decision not to provide notice of this filing to Greenwood Village, coupled with the inaccurate information contained in the filing, suggests that the complaints regarding the other local governments identified by Qwest may well be inaccurate as well. Greenwood Village suggests that the Commission disregard the information submitted by Qwest in its ex parte presentation, and require in all future cases that state and local governments identified in *all* proceedings before the Commission as examples of bad practices warranting preemption of state and/or local authority, be provided notice by the entity making the filing, so as to provide due process and a fair opportunity for response.

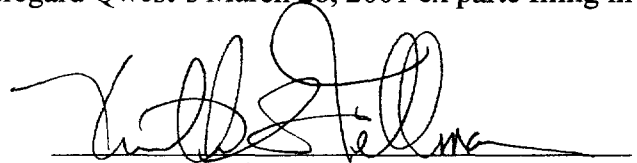
III. CONCLUSION

At the time of Qwest's filing of its ex parte materials on March 28, 2001, Qwest knew, but did not disclose represent to the Commission, that the "ordinance" was only a draft, and had not yet been presented to the Greenwood Village City Council. Qwest identified complaints to the Commission regarding certain sections of the ordinance without informing the Commission that it was working with Greenwood Village to address these complaints. Qwest also knew, based upon its meetings and correspondence with Greenwood Village, that there would be subsequent drafts of the ordinance which would address at least some of the concerns raised by Qwest in mid-March, and failed to include this information in its written ex parte filing. Qwest identified sections of the ordinance to the Commission as problems, without identifying those sections to Greenwood Village as problems. Finally, Qwest misrepresented that Greenwood Village had enacted a moratorium, when in fact that had not occurred, and failed to inform the Commission that Qwest has continued to receive permits from Greenwood Village, uninterrupted, for work in the public rights of way. Qwest made all of these representations to the Commission without informing Greenwood Village that Qwest was using Greenwood Village as an example of an entity that was pursuing "bad practices" and in support of its position that the Commission commence rulemaking to limit local right of way management authority.

The process for developing the Greenwood Village ordinance demonstrates that local governments and the industry can work together in the development of right of way management regulations. The two sides will not agree on every issue, but by and large, workable ordinances will result from this process. Individual problems should be addressed on a case by case basis. It would be simpler for the industry to bypass local government, and rely on a national rule

preempting local management authority. However, such a rule is neither warranted, nor is there legal authority to impose it.

For all of these reasons, Greenwood Village respectfully requests that the Commission disregard all of the information it received from Qwest in the ex parte meetings that occurred during the month of March 2001, and further disregard Qwest's March 28, 2001 ex parte filing in these proceedings.



Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Dr., Suite 900
Denver, Colorado 80209
(303) 320-6100

Attorneys for the City of Greenwood
Village, Colorado

CERTIFICATE OF SERVICE

I, Elizabeth Jackson, a legal assistant at the law firm of Kissinger & Fellman, P.C., hereby certify that on this 5th day of July, 2001, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

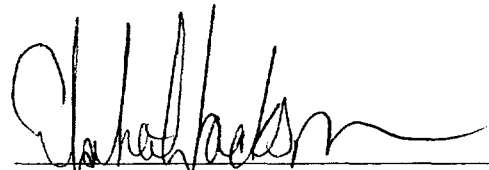
The Honorable Kathleen Q. Abernathy, Commissioner
The Portals
445 12th Street, S.W.
Room 8-A204
Washington, D.C. 20554

The Honorable Michael J. Copps, Commissioner
The Portals
445 12th Street, S.W.
Room 8-BA302
Washington, D.C. 20554

The Honorable Gloria Tristani, Commissioner
The Portals
445 12th Street, S.W.
Room 8-B115H
Washington, D.C. 20554

The Honorable Kevin J. Martin, Commissioner
The Portals
445 12th Street, S.W.
Room 8-C302
Washington, D.C. 20554

Lynn R. Charytan, Esq.
Wilmar, Cutler & Pickering
2445 M. Street, N.W.
Washington, D.C. 20037-1420


Legal Assistant

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED
JUN 29 2001
**KISSINGER &
FELLMAN, P.C.**

In the Matter of)

Notice of Inquiry:)

Promotion of Competitive Networks in Local
Telecommunications Markets)

WT Docket No. 99-217

AFFIDAVIT OF KENDRA L. CARBERRY

STATE OF COLORADO)

) ss.

COUNTY OF DENVER)

Affiant, duly sworn and upon her oath, states as follows:

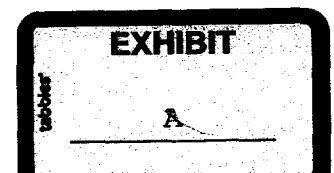
1. My name is Kendra L. Carberry. I am an attorney licensed to practice law in the State of Colorado.

2. I am employed by the law firm of Hayes, Phillips & Maloney, P.C., in Denver, Colorado. Herbert C. Phillips of our firm is the City Attorney for Greenwood Village, Colorado, and I serve as one of the Assistant City Attorneys. In this capacity, I am the Assistant City Attorney who has had primary responsibility for the development of Greenwood Village's Public Right-of-Way Permit Ordinance.

3. The development of this ordinance has been in process for approximately three years. Beginning in early March, 2001, Greenwood Village has shared drafts of its ordinance with approximately 70 representatives of the telecommunications and utility industry and other users of the public rights-of-way. Greenwood Village has actively sought the industry's comments on the proposed ordinance, and has initiated numerous discussions with industry representatives. Qwest Communications is one of the industry representatives that has been involved in reviewing and commenting on various drafts of the ordinance. My primary contact from Qwest has been James P. Campbell.

4. In early March 2001, Greenwood Village was working on Draft No. 3, the latest iteration of the Public Right-of-Way Permit Ordinance. Draft No. 3 is dated 3/7/01, and was provided to Qwest, among others. During the month of March, after receiving written comments from Qwest, I met personally with Mr. Campbell. A number of the proposed meeting dates were postponed because, as Mr. Campbell explained to me, Qwest had meetings scheduled in Washington D.C.

5. Mr. Campbell did attend a meeting with me on behalf of Qwest on March 14, 2001. Based upon that meeting, a number of changes were made in the draft ordinance, resulting in a new Draft No. 4. I received an email message from Mr. Campbell dated March 23, 2001,



which included his marked up version of the latest draft of the ordinance. Mr. Campbell's cover message to me with his marked up version of the ordinance is attached to Greenwood Village's Ex Parte Comments as Exhibit B.

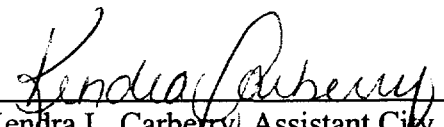
6. When Greenwood Village recently learned of Qwest's ex parte filing with the Commission in this proceeding, City staff members and officials were shocked to find that Qwest was alleging that Greenwood Village had enacted a "moratorium" on the issuance of permits for work in the public rights-of-way. In all of our meetings, telephone conversations and correspondence, neither Mr. Campbell, nor anyone else from Qwest ever expressed a concern to me that Greenwood Village was enacting or proposing to enact a moratorium. In fact, no moratorium has ever existed. Moreover, the City has reviewed its public right-of-way permit records, and Qwest has never been denied any permit to conduct operations in public rights-of-way by Greenwood Village based on the proposed ordinance or any so-called moratorium.

7. Qwest did raise concerns in our meeting on March 14, 2001 regarding the draft ordinance, and specifically the restrictions on access to certain streets in Greenwood Village. The ordinance would have restricted major installations in the six major arterial streets within the City to a rotating three-year schedule, with major installations only occurring during one year in every three years. "Major installations" are installations of 500 feet or more. The ordinance was amended in a subsequent draft to address Qwest's concern regarding customer service and provider of last resort obligations. During the month of March and thereafter in my numerous communications with Mr. Campbell, Mr. Campbell never once informed me that Qwest was complaining to the Commission about Greenwood Village's draft ordinance.

8. The City is currently working on Draft No. 10 of the ordinance, which is seven drafts beyond the one submitted to the Commission by Qwest. It is likely to be scheduled for a City Council Study Session in July, with formal consideration to take place sometime later this summer. The ordinance that City Council will consider contains substantial changes from the draft that Qwest gave to Commission Staff. The final version will incorporate numerous changes proposed by Qwest and other members of the telecommunications industry.

9. I have reviewed the Ex Parte Comments of the City of Greenwood Village, Colorado that are being filed together with this Affidavit, and the information contained therein is accurate to the best of my knowledge, information and belief.

Further, Affiant sayeth not.


Kendra L. Carberry, Assistant City Attorney
City of Greenwood Village, Colorado

Subscribed and sworn to before me this 28th day of June, 2001 by Kendra L. Carberry, Assistant City Attorney for the City of Greenwood Village, Colorado.

WITNESS MY HAND AND OFFICIAL SEAL.

My Commission Expires: 11-10-01



Mildred L. Axtell
Notary Public